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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Fifth Appellate District

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fifth Appellate District, was certified for nonpublication; it is set forth in its entirety in the Appendix at pages 120–125. This opinion affirmed the judgment of the Superior Court of the State of California, in and for the County of Fresno finding appellant guilty of the crime of armed robbery. A

petition for hearing in the California Supreme Court was denied without opinion on September 21, 1967 (67 A.C. No. 7, Minutes p. 6).

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, section 1257(3), United States Code.

The judgment of the California Court of Appeal, Fifth Appellate District was entered on April 25, 1967 (A.120-125). A timely petition for hearing in the California Supreme Court was filed on June 2, 1967, and denied on June 21, 1967 (A.126). The remittitur issued June 26, 1967 (A. 1). Petitioner's motion to recall the remittitur was denied by the California Court of Appeal, Fifth Appellate District, on June 28, 1967 (A.1). On July 31, 1967, the California Supreme Court extended its time for considering a petition for hearing; this petition was denied on September 21, 1967 (A.2).

A timely petition for writ of certiorari and motion to proceed in forma pauperis was filed with this Court on September 8, 1967 (A.2). A response was requested of respondent. After submission of the response, the petition for certiorari was granted on March 25, 1968, limited to the question of whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights (A.127).

QUESTIONS PRESENTED

1. Were the police lineups so unnecessarily suggestive and conducive to irreparable mistaken identifica-

tion as to constitute a denial of due process to petitioner?

2. Did the one-to-one confrontation with petitioner at the victim's request violate the petitioner's constitutional right to the privilege against self-incrimination?

3. Should a harmless error rule be applied to any alleged errors in the lineups or confrontation?

STATUTES INVOLVED

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

On March 17, 1966, the District Attorney of Fresno County filed in the Fresno Superior Court an information charging petitioner and one John Henry Grice with armed robbery in violation of California Penal Code section 211(a);[1] petitioner Walter B. Foster was also charged with two prior felony convictions: (1) assault with intent to commit rape; and (2) robbery (A.5).

On March 21, 1966, counsel was appointed to represent petitioner (A.6). Petitioner was arraigned, pleaded not guilty, and admitted the truth of the alleged prior felony convictions (A.6).

On May 9 and 10, 1966, petitioner, represented by counsel, was tried before a jury in the Fresno County Superior Court (A. 7,8,21-100). On May 10, 1966, the

[1] See Appendix B hereto.

jury returned its verdict of guilty of armed robbery, first degree, and found that petitioner was armed with a deadly weapon (A. 11,15,118).

Codefendant Grice was acquitted (A.118).

On May 24, 1966, the court denied probation to petitioner who was present in court with counsel and entered a judgment of conviction (A. 16,17). The court sentenced petitioner to the California State Prison for the term provided by law (A. 18).

A timely notice of appeal was filed (A. 19), and the judgment affirmed on appeal by the Court of Appeal of the State of California, Fifth Appellate District. The court's opinion was certified for non-publication (A. 119-125). A petition for hearing was denied by the California Supreme Court (A. 126).

The Robbery

At approximately 5:00 p.m. on January 24, 1966, petitioner and James Clay met by happenstance in the "Chinatown" section of Fresno, California (A.45,46). They had not met previously although Clay had seen petitioner before (A. 45,57). The two men discussed girls and shared Clay's "triple jack". Upon petitioner's assurance that he could get a girl for Clay, Clay drove the petitioner to the rooming house where petitioner lived (A.57). They arrived there at approximately 5:30 p.m. (A.46,47). The two men continued to talk and drink in petitioner's room; between 7:30 and 8:00 p.m., petitioner asked Clay if he would like to make $50.00 by driving petitioner to

the Western Union office. Clay agreed to do so (A.46,47,59).

Codefendant Grice arrived at petitioner's room at approximately 11:30 p.m. Petitioner and Grice had a conversation outside of Clay's presence (A.47). They returned to the room; petitioner changed his shoes, donned coveralls and a large brimmed hat and announced, "Let's go" (A.47,48). Clay knew, because of petitioner's offer of $50.00 to drive him to the Western Union office, that "something was going on wrong" but he did not realize what his role was to be (A. 68).

Clay followed the directions given to him by petitioner and drove to the Western Union office in Fresno (A. 49,60,67). Petitioner then told Clay that he was to accompany petitioner into the Western Union office and gave Clay a revolver (A.49,60,69). Clay was instructed by petitioner that once inside, he, Clay, was to write a note stating in effect that this is a holdup, open the safe and hurry up. The third man, codefendant Grice, remained in the car (A.50,60,70).

Petitioner and Clay entered the Western Union office at approximately 12:30 a.m. on January 25, 1966. Joseph E. David, the Western Union operator, was on duty alone when the two entered. Clay wrote a note on a Western Union money order blank and handed it to Mr. David. The note stated, "This is a hold-up . . . go and open the case" (A. 26,50,60, 69,70). At the time Clay handed the holdup note to the victim, petitioner had taken the pistol out of his

pocket and was pointing it at the victim (A. 26,27, 51,61). Clay also drew his gun (A. 51).

The Western Union office was well lighted and the victim, Mr. David, could see the robbers clearly (A.27). Mr. David was told to get the cash box and petitioner said to him, "Watch what you do" (A. 27). Mr. David got the cash box and brought it to the counter where it was opened and the money exposed to view. Petitioner said, "Give me the large" and he took the bills, approximately $500.00, and left the office (A.27,28,52). Clay, after a brief period followed petitioner out of the premises and joined petitioner and Grice in the waiting car. Inside the car, petitioner said, "See how easy that worked? All white folks think colored folks look the same. They never know who it was" (A.52).

The victim, Mr. David, testified that petitioner was wearing a hat with a turned-down brim, coveralls and a leather jacket under the coveralls (A.29,30). Clay testified [2] that petitioner was wearing coveralls and a large black hat, the brim of which came down over his face (A.48), and that he had been wearing a black leather jacket earlier which Clay did not see him take off before putting on the coveralls (A. 59). Petitioner spoke several phrases in the Western Union office while the robbery was in progress: "Do what it say" (A. 26); "You better do what it say" (A. 26,51); "Watch what you do" (A. 27); "Give me the large" (A. 28,36). He spoke in a soft voice (A. 37). These

[2] Clay pled guilty to a charge of armed robbery and testified for the prosecution at petitioner's trial (A.54,63,71).

directions spoken by petitioner were directed to the victim, Joseph E. David.

The trio then returned to petitioner's rooming house where petitioner and Grice got out of the car. Clay returned petitioner's gun and a later meeting was arranged for payment to Clay of the $50.00 previously agreed upon (A.53). At that meeting, during the afternoon of the 25th, petitioner declined to make payment saying he would do so when "the heat would cool down"(A.54,69). Clay subsequently turned himself in to the police and implicated petitioner and Grice (A.71,72).

The Lineups

Shortly (1–3 days) after the robbery, Mr. David was summoned to view a police lineup. He was given no additional information but merely asked to participate in the lineup proceeding (A. 41). Petitioner was on the righthand end of the three-man lineup; he was wearing a leather coat but no hat (A. 40). Mr. David described petitioner as being approximately six feet tall and the other two participants in the lineup as being approximately 5'5" or 5'6"; both of them, apparently, wore hats; one had a moustache (A. 39;40,41,42). David had not seen either of the two men before (A. 40). Mr. David tentatively identified petitioner at that time. He "thought it was" the man (A. 33).

Immediately following this first lineup, Mr. David requested to speak to petitioner and petitioner was brought to an office and viewed by the witness in the

presence of a representative of the police department and of the district attorney's office. Petitioner and the witness sat across from each other and, apparently, engaged in a conversation (A. 39). Mr. David did not make a positive identification of petitioner (A.40).

Approximately a week or ten days later a second lineup was held. Five persons, dressed in fatigues, participated in this lineup. Petitioner was the only person in the second lineup who had been in the first lineup (A. 41). Apparently, codefendant Grice was in this lineup but Mr. David did not identify him (A.44). Following the second lineup, David made a positive identification of petitioner (A.34).

He testified that he had an opportunity during the course of the holdup to see petitioner's face clearly (A.26,27); he also heard his voice during the course of the holdup.

Petitioner did not take the stand at trial or produce any witnesses in his own behalf. Codefendant John Henry Grice testified alleging an alibi for himself but he neither exonerated nor incriminated petitioner by his testimony (A. 87–99).

Petitioner admitted the two prior felony convictions (A. 6). The victim of the prior robbery, Mary Rose Middleton, a Western Union telegraph operator, testified concerning the circumstances of the robbery of the Western Union office at which she was employed on July 4, 1960, and identified petitioner as one of the two robbers (A. 78–80).

SUMMARY OF ARGUMENT

The procedures adopted by the police in the two lineups and the confrontation between the petitioner and the victim of the robbery were neither so suggestive nor conducive to false or mistaken identification of petitioner that petitioner was denied due process of law, particularly in a case where the petitioner was identified at trial by his accomplice who testified as to the details of the crime charged against petitioner.

A one-to-one confrontation for voice identification purposes could not constitute a violation of the privilege against self-incrimination inasmuch as no evidence was adduced of any statements made by petitioner at that time.

If there were any errors in the pre-*Wade* lineup procedures they did not constitute a deprivation of due process of law but would be harmless error under *Chapman* v. *California* (1967) 386 U.S. 18, 22, 17 L.Ed.2d 705, 87 S.Ct. 824.

ARGUMENT

I. The Police Lineups Were Not So Unnecessarily Suggestive and Conducive to Irreparable Mistaken Identification as to Constitute a Denial of Due Process to Petitioner.

In *United States* v. *Wade* (1967) 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926, the majority of this Court concluded that the post-indictment lineup was a critical stage of the prosecution at which a defendant was entitled to the aid of counsel as well as at trial.

See also *Gilbert* v. *California* (1967) 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951. In *Stovall* v. *Denno* (1967) 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967, the Court limited the effect of the *Wade* and *Gilbert* rules to those cases and all future cases which involved confrontations for identification purposes, conducted in the absence of counsel, to those confrontations arising after the date of the decisions, June 12, 1967. California has adopted similar rules.[8]

In *Stovall* v. *Denno, supra,* which involved a collateral attack on pretrial identification procedures, this Court set forth the test to be applied to cases tried prior to the decision in the *Wade* case, and stated:

> "We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. Palmer v. Peyton, 359 F.2d 199. . . . However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . ." (388

[8] *People* v. *Feggans* (1967) 67 Cal.2d 444, 62 Cal.Rptr. 419, 432 P.2d 21; *People* v. *Harris* (1967) 67 Cal.2d 866, 64 Cal.Rptr. 313, 434 P.2d 609; *People* v. *Caruso* (1968) 68 A.C. 181, modified at 272, 65 Cal.Rptr. 336, 436 P.2d 336.

U.S. at pages 301–302 [18 L.Ed.2d 1206] footnote omitted.)[4]

That the question of unfairness depends upon the totality of circumstances presented by the case has been reaffirmed in *Simmons* v. *United States* (1968) 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967, and *Biggers* v. *Tennessee* (1968) 390 U.S. 404, 19 L.Ed.2d 1267, 88 S.Ct. 979.

But before a defendant may invoke the exclusionary concept he must demonstrate that the lineup "resulted in such unfairness that it infringed his right to due process of law." *Stovall* v. *Denno, supra,* 388 U.S. 293, 299.

It is submitted that in the present case, petitioner has failed to support his contentions in this regard.

The record discloses that the police became aware of petitioner's participation in the robbery through the voluntary statements of his accomplice, Clay, sometime during the afternoon or evening of January 25, 1966. Clay knew petitioner and implicated him by name (A. 72). Within the next few days (1–3) the victim, Mr. David, was contacted by the police and asked to come to a lineup. The person who called "asked if it were convenient for me to come down. They wanted me to look at some men" (A. 41). No suggestion was made to Mr. David that the police had arrested the robbers (A. 41).

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[4] To the same effect see *People v. Caruso, supra,* 68 A.C. 181; *People* v. *Harris, supra,* 67 Cal.2d 866, 872; *People* v. *Feggans, supra,* 67 Cal.2d 444, 448-449; *People* v. *Romero* (1968) 263 A.C.A. 651, 654, 69 Cal.Rptr. 758; *People* v. *Smith* (1968) 259 A.C.A. 861, 866, 66 Cal.Rptr. 551; *People* v. *Irvin* (1968) 264 A.C.A. 881, 892-893, ___ Cal.Rptr. ___.

The first lineup consisted of three men including petitioner (A.33). Two of the men were shorter and smaller than petitioner;[5] petitioner was bareheaded and wore a leather jacket; the other two wore hats and one of them had a moustache (A.40). The record is silent as to whether the other two men were attired in jackets.

After viewing this lineup, Mr. David thought petitioner was the robber but did not make a positive identification (A.33, 39). He asked to be allowed to speak to petitioner and in compliance with this request, petitioner was brought to the office and viewed by the witness in the presence of a representative of the police department and the district attorney's office. Petitioner and the witness sat across from each other and apparently engaged in conversation. The record does not disclose the contents of the conversation, if any, or other details of this meeting. The victim, however, again did not make a positive identification of petitioner (A. 39,40).

The next lineup took place a week or ten days later and consisted of five persons including petitioner (A. 33,41) and codefendant Grice (A. 44). The lineup participants were all dressed in fatigue coveralls; none, except petitioner, had been in the first lineup (A.42). Mr. David, the victim, made a positive identifiction of petitioner at this time (A. 34).

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[5] Mr. David's testimony, the only evidence on the point, was that petitioner was close to six feet tall and the other two men were "maybe 5 feet 5 or 5 feet 6 something in there someplace." (A. 40.)

At trial Mr. David testified briefly on direct examination concerning the lineups and in detail on cross-examination as to both the lineups and the one-to-one confrontation (A. 33,34,39,40,41,42,44). He definitely identified petitioner as one of the robbers (A. 25).

Considering the totality of these circumstances, it appears that the procedures adopted by the police did not so violate the canons of decency nor offend the sensitivities that the principles of *Rochin* v. *California* (1952) 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205, should be applied. The conduct of the lineups did not result in a tainted, in-court identification.

In the present case it appears that there was a cautious victim who wished to be fairly certain of his identification and not to mistakenly identify the wrong person. He had ample opportunity to view the robbers during the course of the robbery since they were on the well-lighted Western Union office premises for approximately ten minutes (A. 26,27,34). See *People* v. *Ford* (1967) 89 Ill.App.2d 69, 233 N.E.2d 51; *State* v. *Sears* (1967) 182 Neb. 384, 155 N.W.2d 332.

The first lineup conducted shortly after the robbery consisted of three people. The police prior thereto in no way suggested that one of these individuals was the suspect, when the victim was asked to come to the station to view the individuals. See *Wise* v. *United States,* 383 F.2d 206 (D.C.C. 1967); *United States* v. *Quarles,* 387 F.2d 551 (4th Cir. 1967); *Caples* v. *United States,* 391 F.2d 1018 (5th Cir. 1968).

Immediately after this lineup, petitioner's presence was requested by the victim who had tentatively identified him in order that he could confront him since the robber had spoken several phrases during the course of the robbery (A. 26,27,28,36,37,51). This was done and a conversation had. No evidence of the conversation or statements made at that time were sought to be introduced in evidence. See *Hanks* v. *United States*, 388 F.2d 171 (10th Cir. 1968); *Crume* v. *Beto*, 383 F.2d 36 (5th Cir. 1967).

Petitioner was not masked at the time of the robbery but wore a distinctive dress, a coverall over his leather jacket and a hat with the brim turned down (A. 29,30). The victim gave approximately the same description of petitioner's clothing as did petitioner's accomplice who testified at the trial (A. 29,30,48,59).

At the trial both the victim and petitioner's accomplice identified petitioner as one of the robbers. His accomplice, who had previously pled guilty, testified completely as to the commission of the offense by the men. It was also established that petitioner had several years previously been one of those who had participated in the robbery of another Western Union office and its employee, and he was so identified by that employee at the trial (A. 78-82).

Under federal law no corroboration of accomplice testimony is required. *Moody* v. *United States*, 376 F.2d 525 (9th Cir. 1967), reversed on another ground; *Lockett* v. *United States*, 374 F.2d 883. It is required under California law, section 1111, Penal Code, and

was supplied by the testimony of Mr. David. *People* v. *Wade* (1959) 53 Cal.2d 322, 329, 349 P.2d 116, 1 Cal.Rptr. 683; *People* v. *Wayne* (1953) 41 Cal.2d 814, 822, 264 P.2d 547; *People* v. *Parker* (1965) 235 Cal.App.2d 86, 44 Cal.Rptr. 900. The in-court identification of petitioner by Mr. David as well as his description of the clothing worn by the robber fully corroborated the testimony of the accomplice as to the petitioner's connection with the offense.

Thus the circumstances presented in this case are far different than those before the courts in *Palmer* v. *Peyton*, supra, 359 F.2d 199; *People* v. *Ballott* (1967) 20 N.Y.S.2d 600, 233 N.E.2d 103; or *People* v. *Caruso, supra,* 68 A.C. 181, cited by petitioner in support of his contention that the lineups were so unfair as to deny petitioner a fair trial.

In *Palmer* v. *Peyton, supra,* the defendant at the time of the commission of the rape had been attired in an orange shirt with a paper bag over his head. The victim viewed a lineup the next day and made no identification of the defendant who had been arrested on a tale told by his neighbor. On the way to the station the following day, the victim was advised by the police that they had a Negro suspect and she was to listen to him for a possible voice identification. No lineup was held nor confrontation allowed at that time. The victim was placed in one room and the suspect in another. The victim was shown an orange shirt and the suspect was asked to speak. Based on the words spoken, the victim identified the suspect. She

[6] See Appendix B.

heard no other voices for comparison and the alleged rapist was given no opporunity to confront her. At trial she testified to her extra-judicial identification but did not make an in-court identification. The court held that the conduct engaged in by the police did not comport with the standards of decency and fairness required under the due process clause; that the opportunity for suggestion which was inherent in the procedure used to secure this identification was manifest.

Again in *People* v. *Ballott, supra,* 20 N.Y.S.2d 600, a Negro wearing a hat and heavy overcoat with the collar turned up robbed a company of its payroll. Two witnesses saw him but one did not see his face. One year later, the police showed the other witness the defendant, alone, in a station house. After he spoke the words used on the day of the robbery and put on a coat and hat, she identified him. She also identified him in court. The court held that absent "imperative" circumstances, the practice of having a witness view only one suspect could be so suggestive as to amount to a denial of due process.

In *People* v. *Caruso, supra,* 68 A.C. 181, the defendant was the driver of a "get-away" car in a robbery. The witnesses at the scene had scant opportunity to view him. He was picked up the same night and placed in a lineup the next morning with four others. He was 6 feet 1 inch, weighed 238 pounds, was of Italian descent with a dark complexion and dark wavy hair. The other four members of the lineup neither resembled him in size, complexion or hair.

Although the victims identified the defendant in the lineup and at trial, the court held that the lineup was unnecessarily suggestive and conducive to irreparable identification so as to deprive defendant of due process of law. However, in that case the defendant was only briefly seen at the time of the robbery, he produced evidence of an alibi, and his testimony showed no motive for the robbery.

In the present case as appears from the record, the victim had full opportunity to see and hear the robbers; the scene of the robbery was well lighted; petitioner's clothes were distinctive; he was not masked; he was fully identified by his accomplice whose trial testimony corroborated that of the victim and the totality of circumstances showed that the lineups were not unnecessarily suggestive or conducive to irreparable misidentification as to deprive him of due process of law. As is apparent, the pretrial lineups and confrontation did not affect the integrity of the fact-finding process and under the facts of the case created no clear danger of convicting the innocent.

II. The One-to-One Confrontation of Petitioner With the Victim at the Victim's Request After His Tentative Identification of Petitioner at the Lineup Did Not Violate Petitioner's Privilege Against Self-Incrimination.

Petitioner seeks to attack the one-to-one confrontation following the first lineup which was held at the victim's request as a violation of his privilege against self-incrimination under the Fifth Amendment.

Since the decision of this court in *Holt* v. *United States* (1910) 218 U.S. 245, 54 L.Ed. 1021, 31 S.Ct. 2,

where the accused was required, over his protests, to put on a blouse, the argument that such compelled activity violated the privilege against self-incrimination has been rejected. As stated by Mr. Justice Holmes in that case, at pages 252–253:

> "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

So through the years, in *Breithaupt* v. *Abram* (1957) 352 U.S. 432, 1 L.Ed.2d 448, 77 S.Ct. 408; *Schmerber* v. *California* (1966) 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826, petitioner's contention has again been rejected. In *Schmerber* v. *California, supra,* at page 761, Mr. Justice Brennan, speaking for a majority of the Court, stated:

> ". . . We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

In *United States* v. *Wade, supra,* 388 U.S. 218, the majority of this Court again rejected the contention

that a suspect who was compelled to appear in a lineup, wear strips of tape on his face and speak words allegedly used by the bank robber was subjected to a violation of his privilege against self-incrimination and stated, at pages 222-223:

> "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

To the same effect, see *Gilbert* v. *California,* 388 U.S. 263, 266–267, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (handwriting exemplars).

Here the purpose of the one-to-one confrontation requested by the victim was apparently to see and hear petitioner. It was not to elicit any statement of his guilt. It was solely for the purpose of identification, and certainly not an act of violence upon the person of petitioner.

The results of voice identification tests fall within the category of real or physical evidence. In such a test, the speaker is asked not to communicate ideas or knowledge of facts but to engage in a physiological process necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone, intonation, accent or word stress. The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, skin, physical build and fingerprints. *People* v. *Ellis* (1966) 65 Cal.2d 529, 55 Cal.Rptr. 385, 421 P.2d 393; *Reeves* v. *State* (1968) 3 Md.App. 195, 238 A.2d 307.

Since voice identification is an objective type of factual evidence it does not rely on the veracity of the accused. There is no risk that one would be coerced into falsely accusing himself. *United States* v. *Quarles, supra,* 387 F.2d 551; *Hanks* v. *United States, supra,* 388 F.2d 171.

Petitioner seeks to justify the exclusion of this type of testimony on the ground that it requires a volitional act from the accused and that the state in its sense of fairness should be precluded from demanding assistance of any kind from an individual in penal proceedings against him. This theory attempts to classify certain aspects of a suspect's conduct which occur during the investigative stage or while undergoing identification tests as "active" and thereby barred by the privilege, and other aspects as "passive"

and hence allowable under the privilege. But cooperation by suspects with law enforcement personnel is not diminished in degree because it involves motionless conduct on the part of those investigated. An identification that is based on passively-manifested conduct, such as holding the head erect and still for a photograph or the fingers steady during fingerprinting is not significantly different from identifications that flow from more active or volitional responses such as turning around in a lineup or speaking as part of a voice identification test. There is not a clear enough distinction between the various physical responses to identification tests to warrant the suggested selective widening of the privilege.

Further, it should be remembered that in this case the victim made no separate and distinct voice identification of petitioner either before or at the trial. At best, the voice was only one of many impressions used by the victim to reconstruct the image of the whole robber. To the extent that the voice contributed to the overall identification, it was a reliable factor. Accomplishing voice alteration under the circumstances surrounding the robbery and the police station meeting would have been extremely difficult. The psychological pressures inherent in such occurrences would have made the concentration necessary to maintain a changed voice through either or both of the confrontations an impossible task for all but the most disciplined of individuals. Therefore, the similarity between the voice heard at the time of the crime and that heard during a voice identification test would be

reliable evidence of identification and also evidence that an alteration had not been attempted or adequately executed by the suspect at the time of the crime.

Nothing in the record suggests that the victim failed to obtain a sufficient sample of petitioner's voice at the time of the robbery. The two were in close proximity, the victim recalled the words used by petitioner and petitioner was not wearing a mask or anything over his mouth which might have muffled or changed the sound. The drama of the occasion heightened the victim's memory of the voices that confronted him the night of the robbery and gave him a valid basis with which to judge any later voice identification tests.

Although it may be assumed that petitioner was compelled to enter the room for the one-to-one confrontation, there is nothing in this record which discloses that he was compelled to engage in a "conversation" with the victim once he was inside the room. There is no showing that he was compelled to speak or perform voice tests while he was with the victim. The word "conversation" implies mutual participation and the unhindered and uncoerced exchange of comments. In fact by entering into and continuing the conversation, it would appear that petitioner would have effectively waived the contention that he was compelled against his will to incriminate himself.

It should also be noted that no objection was raised to any testimony as to this confrontation in the trial court. On the contrary, the details of this occurrence

were only brought out on cross-examination and no mention made thereof on direct examination. Since a violation of the privilege against self-incrimination as contained in the Fifth Amendment was applied to the states in *Malloy* v. *Hogan* (1964) 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489, decided prior to the trial of this case, petitioner's failure to object on this ground at the time of trial and to move to strike any testimony of the witness was not excused,[7] nor was any objection raised on motion for new trial.

Thus it would appear that in the present case, the question of voice identification is not squarely presented but, even if it were, the language of the *Wade* case, *supra,* as well as previous cases decided on this point, are authority for the proposition that the privilege against self-incrimination does not apply to either the confrontation or the conversation which took place in this case.

III. Under the Facts and Circumstances of This Case if There Was Any Error in the Lineup Procedures A Harmless Error Rule Should Be Applied.

The basic purpose of the *Wade* and *Gilbert* cases is to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel to the end that the possibility of mistaken identification will be prevented or minimized. Thus in *United States* v. *Wade, supra,* 388 U.S. 218, at 228, the Court stated:

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[7] *Schmerber* v. *California, supra,* 384 U.S. at 765-6, fn. 9

"A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . . Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest. . .

"Moreover, '(i)t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then before the trial.' "

The Court in the *Stovall* case looked to the "totality of the circumstances surrounding it" to determine whether the conduct of the confrontation violated due process of law. See also *Simmons* v. *United States, supra,* 390 U.S. 377; *Biggers* v. *Tennessee, supra,* 390 U.S. 404.

In *Gilbert* v. *California, supra,* 388 U.S. 263, the Court held that the admission of the in-court identifications following a lineup conducted without notice to and in the absence of the accused's counsel was a denial of the Sixth Amendment right to counsel and called into question the admissibility at trial of the in-court identifications by witnesses who attended the lineup. However, in the course of its opinion (388 U.S. at p. 272), the Court makes it clear that in any case

where such error occurred the prosecution has the opportunity to establish that the introduction of such evidence was harmless error.

Here the record shows: 1) that the first lineup was shortly after the offense—petitioner was tentatively identified by the victim; 2) no suggestion was made to the victim that the lineup contained one of the suspects; 3) the victim requested that the person he tentatively identified confront him; 4) the victim made no pretrial identification of another person; 5) at the time of the robbery, the victim had full opportunity to see and hear the petitioner and to observe his distinctive dress; 6) the victim's description of petitioner's clothing was corroborated by that of petitioner's accomplice; 7) petitioner's accomplice identified him at the trial and testified fully as to the robbery and petitioner's participation; 8) the victim identified petitioner at the trial; 9) petitioner was identified at trial as one of the persons who had committed a robbery of a Western Union office several years previous to this robbery.

The application of a harmless error rule to a case involving any alleged constitutional error in the conduct of pre-indictment lineups is entirely consistent with and closely related to the court's expression in the *Stovall* case that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of circumstances surrounding it." Certainly the circumstances of the lineups and confrontation in this case should not be considered as ones

which could not be cured by the application of a harmless error rule.

The reasons given by this Court for not giving *Wade* and *Gilbert, supra,* retroactive effect (namely, [1] the law enforcement officials of the federal government and of all 50 states had proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification; [2] the Court's rulings were not foreshadowed by its cases; [3] the majority of American courts treated the question as one of credibility for the jury and not admissibility; [4] law enforcement officials had relied on this weight of authority in conducting pretrial examinations in the absence of counsel; and [5] the retroactive application of the *Wade* and *Gilbert* cases would seriously disrupt the administration of the criminal law) certainly would tend to support the ruling that petitioner was not subjected to a deprivation of his constitutional rights by the procedures adopted in a pre-*Wade* case.

Under California law, counsel for the defense prior to trial has full opportunity for discovery, including copies of police reports. *People* v. *Riser* (1957) 47 Cal.2d 566, 305 P.2d 1; *People* v. *Estrada* (1960) 54 Cal.2d 713, 7 Cal.Rptr. 897, 355 P.2d 641; *Ballard* v. *Superior Court* (1966) 64 Cal.2d 157, 49 Cal.Rptr. 302, 410 P.2d 828. Thus counsel for the defense prior to this trial would have had an opportunity to obtain these documents and ascertain any statements made by the witnesses as to descriptions or lineups. At trial counsel for petitioner had full opportunity to cross-

examine the victim as to the identification procedures adopted. This was relevant evidence and properly brought before the jury. *People* v. *Diaz* (1967) 66 Cal.2d 801, 58 Cal.Rptr. 729, 427 P.2d 505; *People* v. *Parham* (1963) 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001.

In this case no objection was raised at trial or on motion for new trial as to evidence regarding the lineups or confrontation. In fact, the evidence as to the confrontation was first developed by defense counsel upon his cross-examination of the victim. Though counsel may not have been required to possess the prescience to anticipate the *Wade* and *Gilbert* decisions by one year, nevertheless an objection based upon the provisions of the Fourteenth Amendment could have been raised.

Again, as to any alleged violation of the provision against self-incrimination, the case of *Malloy* v. *Hogan, supra,* 378 U.S. 1, was decided some two years prior to the trial of this case. Hence any objection based upon the privilege against self-incrimination should have been raised by motion to strike the victim's testimony and an objection made on this ground or on motion for new trial. Thus, it would appear that the questions now sought to be raised were not properly preserved in the trial court.

To further support the contention of the respondent that any error in the lineups even if considered of

constitutional magnitude should not require a reversal of state court judgments in pre-*Wade* and *Gilbert* cases reference should be made to the recent statute passed by Congress, P.L. 90-351 on June 19, 1968, where in Section 2002 thereof it is provided:

> "The testimony of a witness that he saw the accused commit or participate in the commission of any crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States."

This Court should not require a stricter standard for state courts than Congress has now delimited for federal courts and prosecutions.

No alleged error in the lineups should be held to taint the proceeding against petitioner nor warrant the setting aside of his conviction where, as here, the accomplice fully testified in open court as to the identity of petitioner and petitioner's participation in the offense charged, which evidence fully corroborated the victim's testimony as to petitioner's participation in the robbery and which was in no way challenged by petitioner's contrary evidence.

It is submitted that there is no reasonable doubt under the facts of this case that the verdict would have differed or a result more favorable to petitioner have

been reached if any alleged errors had not occurred. *Chapman* v. *California,* (1967) 386 U.S. 18, 22, 17 L.Ed.2d 705, 87 S.Ct. 824; *Fahy* v. *Connecticut* (1963) 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229.

CONCLUSION

Respondent respectfully submits that the judgment of the Court of Appeal of the State of California, Fifth Appellate District, should be affirmed.

Respectfully submitted,

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